

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 6**

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**DUQUESNE UNIVERSITY OF THE HOLY  
SPIRIT,**

**Employer,**

**v.**

**Case No. 06-RC-080933**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION, AFL-  
CIO/CLC,**

**Petitioner.**

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**Union's Response In Opposition to  
Employer's Request for Review**

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## **Introduction & Summary of Argument**

Duquesne's request for review, though laden with sanctimonious claims about how religious it is, is profoundly dishonest as well as strangely vindictive. Of course, the true facts, as demonstrated on the record, show that Duquesne does not hold out its adjunct faculty as having any responsibility, specific or otherwise, to further a religious mission. The most powerful evidence of this, which Duquesne therefore ignores in its 50-page brief, is the adjunct appointment contract which not only fails to state that the adjunct has any duty to carry out any religious function or mission, but fails to state that any such mission or function even exists at Duquesne. (See, Union Ex. 22). The only thing notable about the appointment contract is the meager wage set forth in it – a mere \$2,556.00 for the course (*Id.*).

What comes through loud and clear from this, and the only take-away for the adjunct, is that Duquesne is most interested in getting adjunct faculty at bargain-basement rates, and is wholly indifferent as to whether they perform any religious function. Despite this clear message, and despite the fact that Duquesne is committed to the AAUP Freedom of Association principles which provide that it may not impose any religious requirements on faculty without making the faculty aware of such requirements at the time of appointment (Union Ex. 11 at p. 14), Duquesne now threatens to fire the adjuncts who truthfully testified about the utter lack of expectation communicated to them by the University about advancing any religious mission. (Duq. Request for Review at ps. 42-43, fn. 19).

In short, while Duquesne, which initially entered into an election stipulation agreement and then backed out of it weeks later when it realized that it could attempt to use religion as a means of union avoidance (Board Ex. 1(g)), has failed to show in its Request for Review that it is entitled to a religious exemption under the Board's holding in *Pacific Lutheran*. What it has

demonstrated, however, is how desperately its adjuncts need the protection of the National Labor Relations Act and of a union.

### **Procedural Background**

This case has a long, storied history. In May of 2012, the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (“Union”) approached Duquesne University of the Holy Spirit (“Employer” or “Duquesne”), and asked the Employer to voluntarily recognize it as the exclusive representative of the Employer’s adjunct professors at McAnulty College based upon a showing of interest through card check. (Tr. 479-481). The Employer declined this offer, and instead, asked the Union to file a representation petition with the NLRB. (*Id.*). The Union did in fact file such a petition with NLRB, Region 6. (Board Ex. 1). The parties then negotiated and entered into a Stipulation of Election in which Duquesne, *inter alia*, agreed that it is an Employer within the meaning of the Act, consented to the jurisdiction of the NLRB, waived its right to a hearing, agreed to be bound by the Board’s Rules and Regulations, and consented to a mail ballot election. (*Id.*).

Duquesne President Charles Dougherty admitted that he was aware of and approved this Stipulation, and that he understood that the Employer was thereby waiving any objection to NLRB jurisdiction (Tr. 160-161; 166). And indeed, by letter to NLRB, Region 6, dated May 18, 2012, Employer’s counsel Robert L. McTiernan expressly stated that “The employer has no objection to the NLRB’s jurisdiction in this matter.” (Union Ex. 1 (rejected exhibit)).

Shortly after signing the Stipulation, the Employer filed a motion to withdraw from the Petition, asserting that it had a “religious exemption” to Board jurisdiction pursuant to *NLRB v.*

*Catholic Bishop of Chicago*, 440 U.S. 490 (1979). (Board Ex. 1(j)). Region 6 denied this Motion to Withdraw, reasoning:

Subsequent to the *Catholic Bishop of Chicago* ruling the Board asserted jurisdiction over this same employer. *Duquesne University of the Holy Ghost*, 261 NLRB 587 (1982). Since that time the Employer has stipulated to the Board's jurisdiction in three representation cases before the Region, including the instant case. The Motion does not establish that there are any relevant changed circumstances.

(Board Ex. 1(h) at p. 2).<sup>1</sup> A representation election was therefore held pursuant to the Stipulation.

In the meantime, the Employer filed a Request for Special Permission to Appeal the Region's decision. This Request for Special Permission to Appeal was denied by the NLRB which ordered Region 6 to open and count the votes cast in the representation election. (Board Ex. 1(g)). With a vote count of 50 for Union representation and 9 against, the count showed that an overwhelming majority of adjuncts voted for Union representation.

The Employer, continuing to assert its "religious exemption" argument, nonetheless objected to the outcome of the election to the NLRB. Finally, by decision dated February 12, 2015, the NLRB remanded this issue back to Region 6 with the direction to consider it in light of the NLRB's recent decision in *Pacific Lutheran University*, 361 NLRB No. 157 (2014) (Board Ex. 1(aa)).

A hearing in this case was consequently held before Hearing Officer Dalia E. Belinkoff on April 27, 2015 and continuing to and through April 29, 2015.

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<sup>1</sup> While admitting that there are four unions on campus, (Tr. 153-154), Duquesne President Charles Dougherty claimed not to know whether any of them had been certified by the NLRB. (Tr. 196).

### **Statement of Facts**

As the Employer explains in its literature to prospective students, “Duquesne University is a private, coeducational university located on a park-like campus in Pittsburgh, Pennsylvania. Students represent nearly every state in the nation and more than 80 countries.” (Union Ex. 64 at p. 2). And, while it was founded by a Catholic missionary order, “Duquesne was created with a mission to serve students, and that ideal continues to guide and inspire us as we provide the best possible education for every one of our students.” (*Id.*). Its Articles of Incorporation recite the purpose of the institution as “to support and maintain educational programs in all branches of a thorough, moral and secular education . . . .” (Employer Ex. 2 at p. 2).

Duquesne’s Undergraduate Catalog describes the Mission of McAnulty College, where the adjuncts at issue in this case work, as follows:

The College prepares students for productive and creative lives of service in a rapidly changing world. We teach students to think, write and speak clearly and critically, so they can seek truth about God, themselves, and society, and contribute to their families, communities, businesses and professions.

(Employer Ex. 65, 2008-2009 at p. 55, 2009-2010 at p. 55, 2010-2011 at p. 60). The Employer also describes McAnulty College as the school within the university that “competes with the largest range of public and private institutions.” (Union Ex. 13 at p. 14).

As the Employer states in its 2013-2014 Faculty Resource Guide, “[a]s a Catholic University, Duquesne is dedicated to fostering an environment that invites, but does not conscript, participation in spiritual life.” (Union Ex. 27 at p. 2). This point was made abundantly clear at the hearing as well, with President Dougherty admitting that Duquesne does not mandate student attendance at Catholic sacraments, does not only teach Catholic students, does not require faculty attendance at Catholic sacraments, and does not employ only Catholic

professors. (Tr. 59). On this latter score, Provost Timothy Austin explained that, indeed, the law even prohibits the Employer from asking about a prospective faculty members' religious affiliation upon hire, and that the Employer follows this proscription. (Tr. 300-301).<sup>2</sup>

Debra Zugates, Director of Undergraduate Admissions, echoed these sentiments, admitting that Duquesne places no religious requirements on students, and that the Admissions office does not represent to incoming students that there are any such requirements. (Tr. 544). Indeed, much of the Admissions materials distributed to prospective students makes it clear that one need not be Catholic to attend Duquesne. For example, an FAQ about attending Duquesne reads:

### **Faith**

#### **Do you have to be Catholic to attend Duquesne?**

Founded in the Catholic tradition, Duquesne University is Catholic by design and is ecumenical by mission, welcoming students from all faiths to grow in their spiritual journey. There are worship sites nearby for many religious denominations.

(Union Ex. 19; Tr. 238-289).

For his part, counsel for the Employer made it clear that Duquesne “wants, invites and encourages faculty to make the connection between reason and faith between science and God, but the Catholic Church *does not impose that requirement* on its faculty.” (Tr. 15) (emphasis added). Similarly, the Employer does not require the faculty to participate in the Employer's mission, but rather, “[w]hat it does do is invite and encourage all faculty to participate in its mission.” (*Id.*). President Charles Dougherty underscored this point by explaining, “[w]e don't

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<sup>2</sup> Tellingly, the Provost is obviously referring to the anti-discrimination requirements of Title VII. Duquesne apparently honors these requirements even though Title VII, unlike the NLRA, contains an express exemption for religious organizations.



require people to do things that may be incompatible with their own faiths, or even no faith at all.” (Tr. 88).

One of the key features of Duquesne, touted throughout its literature and other media to the public, students and faculty alike, is that Duquesne values and, indeed promotes, “diversity” and “ecumenism.” As Duquesne’s public Diversity Statement makes abundantly clear:

In accordance with the statement of Duquesne University, we serve God by serving students through the maintenance of an ecumenical atmosphere embracing diversity and inclusion.

Guided by the Congregation of the Holy Spirit and its members in over 60 countries, and consistent with our Catholic tradition, our commitment to inclusive excellence encompasses every aspect of personhood – including age, citizenship, disability, ethnicity, gender, race, religion, and sexual orientation.

This commitment is the responsibility of every member of the Duquesne University community . . . .

(Union Ex. 5). Similarly, the Preamble of the Resolutions of the Board states, “[t]he role of Duquesne University is to serve the Pittsburgh community, the Commonwealth of Pennsylvania, the nation and the international community, without discrimination of age, sex, race, creed and national origin, by providing students of good moral character with opportunities for the pursuit of higher education and the attainment of a high sense of moral and social responsibility.”

(Union Ex. 6 at p. 1).

The Mission of the Employer explicitly celebrates diversity and ecumenicism, stating that the Employer is committed to “maintaining an ecumenical atmosphere open to diversity.”

(Employer Ex. 1). In a public document entitled, “University Goals,” Duquesne further states that Duquesne “calls for dialogue among people of different faiths and harmony among the many cultures of the world. There are dozens of religious traditions and many different cultural backgrounds present in some form on campus.” (Union Ex. 3 at p. 1; Tr. 174-175; *see also*,

Union Ex. 4; Employer Ex. 32 at p. 9). The Employer also promotes its commitments to diversity and ecumenicism in materials intended for prospective students. (Union Ex. 58; Union Ex. 61).

President Dougherty underscored this emphasis, stating that “[i]t is an explicit part of our mission to create and foster an ecumenical community. We have had other Christians on campus from the beginning, we have had Jews among our student body on our faculty from the beginning, over the last decade or so we have many Muslims who are on our staff, and in our faculty.” (Tr. 67). And, in terms of interviewing new *full-time* faculty members, President Dougherty explained, “[i]t’s not a conversation about whether they are Catholic or not, it’s a conversation about whether they understand who we are, and whether or not they see themselves being a part of a community with that mission.” (Tr. 106-107).

Of course, exhibiting their general indifference to the adjunct faculty, neither President Dougherty, nor any other witness Duquesne put on the stand, knew anything about them or how they are hired. As President Dougherty testified, “I don’t know exactly how that’s done in the hiring of adjuncts, because that is done at a very decentralized way at department level . . . .”<sup>3</sup> (Tr. 107). President Dougherty does not even know how many adjuncts teach at McNulty College. (Tr. 185). Similarly, the Provost stated that the hiring of adjuncts is decentralized and that he has nothing to do with hiring or interviewing adjuncts; does not know the content of adjunct interviews, or, more specifically, whether Duquesne’s Departmental Interviewing Guidelines relating to the University Mission Statement (Employer Ex. 37) even applies to

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<sup>3</sup> This is consistent with the Employer’s representations to accreditors. Respondents to a survey of adjunct faculty “indicated that the process used to hire adjuncts tends not to be formally documented, and it varies. In most schools, recommendations to hire specific faculty come from the division/department chairs, with the final approval coming from the deans.” (Union Ex. 10, p. 80).

adjuncts; does not know whether the adjuncts complete the employment application marked as Employer Ex. 36; and does not even know approximately how many adjuncts teach at McNulty college. (Tr. 254, 260-261, 301-302, 311-312). Assistant Provost Alexandra Gregory also testified that she has nothing to do with hiring adjunct faculty. (Tr. 347-348).

Faculty at Duquesne have unfettered academic freedom, a fact publicized in numerous documents circulated by the Employer. Indeed, in order to be accredited by the Middle States Commission on Higher Education (“Middle States”) – an accreditation which is critical to Duquesne’s receipt of Title IV financial aid, the denial of which “would be devastating to any university” (Tr. 337) – Duquesne must ensure academic freedom for its faculty. Thus, the governing Middle States Requirements of Affiliation and Standards for Accreditation (“Middle States Requirements,” Union Ex. 12), which appear on Duquesne’s website, make it clear that

Academic freedom, intellectual freedom and freedom of expression are central to the academic enterprise. These special privileges, characteristic of the academic environment, should be extended to all members of the institution’s community (i.e., full-time faculty, adjunct, visiting or part time faculty, staff, students instructed on the campus, and those students associated with the institution via distance education programs).

Academic and intellectual freedom gives one the right and obligation as a scholar to examine data and to question assumptions. It also obliges instructors to present all information objectively because it asserts the student’s right to know all pertinent facts and information. A particular point of view may be advanced, based upon complete access to the facts or opinions that underlie the argument, as long as the right to further inquiry and consideration remains unabridged.

To restrict the availability or to limit unreasonably the presentation of data or opinions is to deny academic freedom. The effective institution addresses diversity of opinion with openness and balance.

Intellectual freedom does not rule out commitment, rather it makes it possible. Freedom does not require neutrality on the part of individuals or educational institutions, or toward the value systems that may guide them. **Institutions may hold particular political, social or religious philosophies, as may individual faculty members or students; but both**

**individuals and institutions should remain intellectually free and allow others the same freedom to pursue truth.**

(Union Ex. 12 at ps. 21-22) (emphasis added).<sup>4</sup>

Accordingly, Duquesne represents to Middle States, in its Self-Study, which is also published on its website, the following:

### **Academic Freedom**

In its Mission Statement, Duquesne defines itself as ‘a community dedicated to the discovery, enhancement, and communication of knowledge and to the free and diligent pursuit of truth, in order to provide society with men and women able and willing to act as wise, creative and responsible leaders’ (appendix MS, p. 1). In practical terms this means that Duquesne is open to the exploration and discussion of new and controversial ideas, and that the University places a premium on intellectual autonomy and integrity and the pursuit of truth through scholarly research.

The *Faculty Handbook* is explicit in its statement that ‘freedom in research is fundamental to the advancement of truth,’ and ‘academic freedom is essential to teaching’ (appendix FHB, p. 12); that is faculty are free to pursue all ideas in their research, to publish the results thereof, and to put forward all ideas relevant to their subject area for critical examination in the classroom setting.

**In keeping with University standards across the country,**<sup>5</sup> Duquesne recognizes the principles of academic freedom and due process as set forth by the Association of American University Professors (AAUP). . . .

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<sup>4</sup>Echoing the 1940 Academic Freedom Statement, the Middle States Requirements make it clear that “[i]nstitutions whose charters and policies require adherence to specific beliefs or codes of conduct for faculty, staff, or students should provide prior notice of these requirements. The institution should state clearly the conditions of employment or study.” (Union Ex. 12 at p. 22). And again, as has been made abundantly clear, because Duquesne’s policies do not require any specific belief, adjuncts consequently are not given notice of such a requirement, and indeed, Duquesne’s ecumenical Mission stands in opposition to such a requirement.

Even the U.S. Conference of Catholic Bishops’ Application of *Ex Corde Ecclesiae* for the United States explains that “Academic freedom is an essential component of a Catholic University.” (Employer Ex. 6, at p. 6). Notably, however, there is no evidence in the record as to whether the document appears on Duquesne’s website or is part of how the Employer holds itself out to faculty, students, and the public. (Tr. 197).

(Union Ex. 10 at ps. 16-17) (emphasis added). Further, Duquesne explains that “[s]tudents are assured of the right to freedom of expression, freedom to pursue educational goals, fair evaluation of academic performance, impartial judicial procedures, and **privacy and confidentiality in regard to their beliefs and political affiliations**, as well as their records.” (*Id.* at p. 18, emphasis added; Employer Ex. 11, at p. 8).

It is hard to think of an institution, whether secular or religious, with much more generous principles of academic freedom. And, indeed, counsel for Duquesne conceded in his opening statement that the principles of academic freedom “cherished in Duquesne, [are] in some ways broader than in secular universities . . . .” (Tr. 15). The Employer trumpets this commitment to academic freedom and inquiry on its website and publications. (Union Ex. 3; Employer Ex. 31, at p. 4).

In the end, the most that Duquesne claims in regard to any possible requirements placed on faculty in regard to the Mission is that they pay respect to it – meaning that they do not denigrate that Mission. (Tr. 15). As President Dougherty explains, “we expect them to respect those beliefs as part of what the community believes, even if they don’t believe them themselves.” (Tr. 117). Even by his own explanation, however, this is alleged requirement is very minimal, meaning that a faculty member should not intentionally mock the notion of serving God by serving students. (Tr. 124-125).

Moreover, it is not even clear that this minimal requirement applies to adjuncts. Thus, while the Faculty Handbook provides that faculty, though having broad rights of academic freedom, “should respect the religious and ecumenical orientation of the University” (Union Ex.

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<sup>5</sup>Notably, Duquesne states, without qualification, that its academic freedom principles are “[i]n keeping with University standards across the country” – that is, Duquesne does not limit its comparison on this score merely to other Catholic institutions.

9 at p. 12), the only evidence presented on adjunct faculty demonstrates that they are not even given this Faculty Handbook upon hire or at any other time. Adjuncts Clint Benjamin and Adam Davis testified that they were never informed of any such limitations either in writing or orally at the time of their appointment or at any time since. (Tr. 471-472, 499).

Outside the few faculty who actually teach Catholic doctrine,<sup>6</sup> it is Duquesne's position that the faculty serve the Mission of the University simply by doing their job of teaching well, even if that teaching is limited to solely secular subjects such as the humanities and sciences. President Dougherty himself claimed that faculty (again, he can't speak specifically about adjuncts, about whom he knows nothing) help students in their spiritual growth simply by virtue of their being

role models . . . in their disciplines, and in their lives. They are mentors to our students. They are advisors. They are not spiritual advisors in the direct sense that a priest would be, but they are in an indirect sense, so that a person develops a spiritual growth through an interaction with a faculty member; whether that's in philosophy, English literature, mathematics, we know that faculty touch students' lives, and that is overwhelmingly positive, and that results in personal growth of a moral and spiritual nature.

(Tr. 96).

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<sup>6</sup> Certain faculty who teach Catholic theology are required to obtain a formal letter of recognition from a Catholic bishop saying that they are teaching "recognized Catholic theology." (Tr. 78). The Employer periodically informs individual faculty members in the theology department teaching Catholic theology of their responsibility to secure a letter of mandatum. (Tr. 78-79). Employer Exhibit 8 contains the only list in the record of Duquesne employees who have such mandata. And, Union Exhibit 44 is a current list of faculty in the Theology Department. Of the eleven individuals identified as "adjunct faculty," (Union Ex. 44, p. 7-8), only three (3) appear on the list of instructors with mandata. (Employer Ex. 8). And, there is record evidence of only one of those three (Ellen Cavanaugh) currently teaching at Duquesne. (Union Ex. 26). And, she does not even teach Catholic theology, but rather Global & Cultural Perspectives. (*Id.*). Moreover, students are not required to take any course in Catholic theology, although they must take one course in the theology department. (Union Ex. 14 at p. 17-18).

Similarly, Darlene Weaver, Director of the Center for Catholic Intellectual Tradition, explained her understanding that all activities of faculty members necessarily advance the religious mission of the Employer merely because they are performed at Duquesne, even if the faculty members are not aware of this and do not intend it. Thus, she stated that teaching the anatomy of the human body has a “de facto connection to the religious academic mission of the university” because the human body is, she believes, a creation of God. (Tr. 421). In the same vein, she explained that, in the context of Duquesne, even an atheist teaching a course about the planets advances this mission although he/she never mentions God, Christianity, etc. (Tr. 430). She declined to speculate on whether the same atheist teaching an identical course on planets at a secular institution would also advance a religious mission. (Tr. 430).

The Employer’s representations about the role of faculty to potential students, accreditors, and the faculty themselves do not give any more specifics about how the job functions of adjunct faculty advance the Employer’s religious goals.

First of all, the Faculty Handbook explicitly states that “adjuncts are responsible only for teaching.” (Union Ex. 9, p. 12). Second, the adjunct appointment letter, which becomes a contract once countersigned by the adjunct, says absolutely nothing about any religious mission, much less sets forth any obligation whatsoever to participate in or further any religious mission. (Union Ex. 22). Indeed, unlike many of Duquesne documents in the record, it does not even include a statement related to the mission of the University. (*Id.*). This is quite significant, as Duquesne has adopted the 1940 AAUP Statement of Principles on Academic Freedom and Tenure (“Academic Freedom Statement”), and specifically, the section of that statement which provides, “Limitations of academic freedom because of religious or other aims of the institution

should be clearly stated in writing at the time of the appointment.” (Union Ex. 10 at p. 17; Union Ex. 11 at p. 14; Tr. 179, 181-183; 279-280).

In addition, the portions of the Employer’s website devoted to faculty hiring do not describe any ways in which they advance the institution’s religious mission. To the contrary, they state that “Duquesne hires faculty who are able to excel as teacher-scholars, deeply invested in their students’ learning” and that the Employer “selects applicants based on their knowledge, skills and abilities and the correlation to the requirements of a particular position.” (Union Ex. 7). The Employer “seek[s] a diverse group of faculty, to broaden the knowledge and experience of our students during their time at Duquesne.” (*Id.*; *see also* Union Ex. 8). Similarly, the Faculty Resource guide contains numerous policies distributed to faculty, but none deal with any religious function of those employees. (Union Ex. 27). For example, its syllabus guidelines do not say anything about the mission of the Employer or how the instructor should promote it or engage with it. (*Id.* at p. 35; *see also* Union Ex. 41). Materials from the Center for Teaching Excellence at Duquesne emphasize the importance of promoting diversity in the classroom, (Union Ex. 39), aid in designing syllabi (Union Ex. 41), and ask adjunct faculty to explore metacognitive issues in their teaching, (Union Ex. 40), but none address any religious or spiritual function expected of faculty.

Because none of Duquesne’s witnesses was familiar with the procedures for hiring, supervising, or evaluating adjuncts, the only testimony on the record regarding Duquesne’s representations to adjunct faculty members is the un rebutted testimony of the two adjunct faculty members themselves. And, they make it clear that Duquesne has never told them that they have any responsibility whatsoever for participating in or carrying out any religious mission.



Clint Benjamin is an adjunct in the English Department at Duquesne. (Tr. 456). He has been working there since 2007. (*Id.*). He teaches UCOR 101 and UCOR 102. (*Id.*). He teaches the same courses at CCAC (the Community College of Allegheny County) (Tr. 457). He explained that the job posting he responded to did not say anything about religious duties. (*Id.*).

And indeed, the one and only adjunct job posting produced by Duquesne in response to the Union's subpoena, and the only one on the record, mentions no such duties. Rather, the posting simply called for someone to teach an upper-level lecture course in Developmental Biology which "should explore the processes of morphogenesis, differentiation, pattern formation, growth and reproduction at the molecular, cellular and organism levels to provide an overview in a variety of organisms." (Union Ex. 23). At the bottom of the posting, in italics, there is simply a description of Duquesne which reads, "Duquesne was founded in 1878 by its sponsoring religious community, the Congregation of the Holy Spirit. Duquesne University is Catholic in mission and ecumenical in spirit. Motivated by its Catholic identity, Duquesne values equality of opportunity both as an educational institution and as an employer." (*Id.*). Again, there is no representation in the posting that the applicant has any role to play in carrying out the "mission." Moreover, as the Provost explained, postings are only one way adjuncts are hired; others are hired by more informal means such as notices sent to Ph.D. departments of other schools and by Department Chairs hiring individuals who send in unsolicited CVs. (Tr. 256).

Meanwhile, Clint testified that he was interviewed for his adjunct position by Greg Barnhisel. (Tr. 460). Clint stated that he was not asked to describe how he would support the university's mission statement. (*Id.*). Moreover, Clint does not believe that he filled out the employment application admitted as Employer Ex. 36. (Tr. 460-461). Similarly, Clint has

never received a copy of the University's strategic plans, (Employer Exs. 18 & 19), and he never received a copy of the Faculty Handbook upon his hire. (Tr. 471-472).

Clint states that he was not asked any of the questions set forth in Employer Ex. 37, entitled, "Departmental Interviewing Guidelines University Mission Statement" (Tr. 461-462). Specifically, he was not asked what aspects of the mission statement appeal to him most; he was not asked how he thinks the mission of Duquesne fits with his work; he was not asked whether any aspects of the mission might cause him concern; and he was not asked how he sees himself as embodying Duquesne's mission. (Tr. 462). Continuing, Clint relates that he was not asked about his thoughts about the relationship between faith and reason in an academic environment. (Tr. 462-463), nor was he asked how he reconciles Duquesne University's commitments to religious and academic freedom; what service means to him in the context of Duquesne's mission statement; how he understood the mission; nor how his discipline enhances it. (Tr. 463). He further testified that, during his interview process, he was not asked about the five pillars of the mission statement or about his religious beliefs; nor was he told that he was required to fulfill any particular religious role. (463-464). Indeed, Clint explained that the mission of Duquesne was never mentioned to him at all. (Tr. 463).

Clint further testified that none of the documents he filled out in the course of applying for employment, or in initiating employment, indicated that he had a religious role to play. (Tr. 464). Clint states that he signed an appointment letter similar to Union Ex. 22, and that he has signed other similar ones for every semester since then. (Tr. 464-465).

As for the classes he teaches, Clint explained that they have no religious content, nor does he integrate religious teachings into the course work. (Tr. 466). Indeed, his syllabi do not even include the university's mission statement. (Tr. 467).

Clint attended an adjunct faculty orientation at the time of his hire. (Tr. 465). He recalled that he was one of approximately six adjunct faculty members in attendance. (*Id.*) No Duquesne officials were able to testify to the number of adjuncts employed in McAnulty college, there were approximately 124 at the time of the election (Board Ex. 1). Across all of its colleges, including Business, Education, Law, and others, Duquesne employed 512 adjunct faculty in Fall 2013. (Union Ex. 50). Clint did not know how many of the five other adjuncts at the orientation session were employed teaching in McAnulty College. (Tr. 465-466).

Attendance at the orientations are optional. (Tr. 200, 271-272, 377). The Employer does not track how many part-time faculty attend the orientations. (Tr. 200). One agenda for an orientation indicates it consists of a presentation on Mission and Identity and six other educational topics. (Employer Ex. 52). At some orientations, the Employer distributed a card with the Mission Statement and a statement that faculty and staff are expected to “commit to the values expressed in the mission statement” and “be respectful of the Catholic tradition on which our university is founded” and “be proud of Duquesne.” (Tr. 371, Employer Ex. 53). There was no testimony that the orientations communicate any expectation that part-time faculty play any specific religious role.

While Clint has had faculty observations of his classes, he has never received any feedback from an observation about religious content or lack thereof, nor about the conformity of his class to the university’s mission. (Tr. 468). Similarly, Clint has never received a comment on a Student Evaluation (Union Ex. 24) indicating that a student was disappointed that there wasn’t more religious content in his course. (Tr. 469). And, no student has ever told him this in any other way. (*Id.*). Indeed, no one from the university has ever given him positive or negative feedback regarding his teaching as it relates to Catholic doctrine or the university’s mission

statement. (*Id.*). The chair of his department has never spoken to him about religion or about any religious role that either Clint or the Chair performs at Duquesne. (*Id.*).

Clint testified that no student has ever turned to him for advice about spiritual development, and that indeed, no one from the university has ever communicated any expectation that he should be a spiritual guide for students. (Tr. 469-470). And, Clint has never been disciplined for failing to live up to Catholic teachings, for failure to teach Catholic doctrine or for failure to adhere to the mission of the university. (Tr. 470).

Finally, Clint has never attended a Convocation, nor has he ever participated in a Duquesne-sponsored Bible study or in a Duquesne-sponsored mission trip. (Tr. 471). And, indeed, every Employer witness who testified on the subject made it clear that there is absolutely no requirement that any faculty members attend such functions as Convocations, mission trips, orientation sessions or other events or functions related to the Mission, nor are they required to go through or interact with the Center for Catholic Intellectual Tradition. (Tr. 87-88; 195-196, 200, 271-272, 347, 377, 441).

Adam Wells Davis is an adjunct professor in the Department of History and teaches the History of Science (Tr. 483). Adam has no participation in campus life beyond the course he teaches. (Tr. 484).

Adam recalls that he found his current job through an advertisement in the *Pittsburgh Post-Gazette* looking for an instructor for the history of sciences. He applied for the position, but the position was initially given to another instructor who left a year later, at which point Adam was called by someone at Duquesne who asked him to take on the class. (Tr. 484-485). Adam then accepted the position. (*Id.*). As far as Adam recalls, the initial advertisement only called for a professor to teach the history of science and nothing more. (485).

Adam was interviewed by the head of the history department, Holly Mayer, who told Adam that he was free to design his own curriculum. (Tr. 486, 512). During this interview, Adam was not asked about his feelings about the Mission Statement. (Tr. 487). Further, he was not asked how he thought the Duquesne Mission statement fit with his work, nor was he asked whether he had concerns about the Mission. (*Id.*). He also was not asked whether he had questions about the Mission, nor was he asked whether he saw himself as embodying Duquesne's Mission. (Tr. 487-488). Moreover, Adam was not asked about the relationship between faith and reason in a university environment, and he was not asked about how he personally reconciled Duquesne University's commitments to religious academic freedom. (Tr. 488). He further was not asked about what service means to him, about how he understood the Mission of the university, or about the five pillars of the mission statement. (*Id.*). Indeed, as Adam explained, the Mission Statement was not mentioned at all, and Mayer never indicated that he would be required to fulfill any religious role (Tr. 488-489). Furthermore, Adam, who describes himself as "largely Unitarian," was not asked about his religious beliefs. (*Id.*). Finally, Adam has never been asked any such questions upon his subsequent reappointments since he began working in the fall of 2008, nor at any other time. (Tr. 490, 492-493).

Adam does not recall filling out the employment application (Employer Ex. 36); he had never seen the document before. (Tr. 489). However, he did verify Union Ex. 22 as an example of the appointment letters he has signed over the years. (Tr. 491).

Adam confirmed that no one from the Duquesne administration, including his Department Chair, has ever indicated that he would be evaluated on the basis of how his teaching comports with Catholic doctrine. (Tr. 492). No one has ever indicated that his teaching would be evaluated on the basis of how it effectuates the mission statement. (*Id.*). And Adam

identified Union Ex. 24, which contains no questions about religion or any religious mission, as the student survey administered to students at the conclusion of the semester. (*Id.*).

Meanwhile, Adam has never attended an adjunct orientation, and indeed was never made aware that such were available. (Tr. 493). In addition, no one from Duquesne has ever communicated an expectation that he should be a spiritual guide for students, or that he would be disciplined for failing to live up to Catholic teachings or for failing to teach Catholic doctrine. (Tr. 493). No one has ever communicated to him that he is expected to discipline students who fail to live up to Catholic teachings or that he is to think about Catholic doctrine when evaluating student work. (Tr. 493). In addition, none of Duquesne's Strategic Plans (Employer Exhibits 18 & 19) were ever given to Adam. (Tr. 493-494). Adam has never attended a convocation, a Duquesne-sponsored Bible study, or a mission trip. (Tr. 494).

Moreover, Adam has never seen Duquesne's faculty handbook. (Tr. 499). His syllabi are not approved by anyone at Duquesne, and indeed he does not even have to show anyone his syllabus. (Tr. 507-508).

When communicating with students or prospective students, Duquesne portrays faculty as gifted educators and scholars who will prepare them for their futures, not as spiritual guides, proselytizers, or Catechism teachers. In his welcome to undergraduates, posted on the Employer's website, the Dean of McAnulty College states that faculty "encourage students . . . demand your best, and . . . want you to participate in their research." (Union Ex. 53). The Employer's website touts faculty members' rigorous engagement with ideas: "Faculty and staff place a premium on intellectual autonomy and integrity and the pursuit of truth through scholarly research." (Union Ex. 3). They are "very passionate about their fields of study." (Union Ex. 52 at p. 3). Promotional materials promise students will "learn from scholar-teachers who provide

an excellent classroom experience and also produce some of the most important research in their fields.” (Union Ex. 35; Union Ex. 36; Union Ex. 37; Union Ex. 38; *see also* Union Ex. 43). For example, the History program website indicates that “the faculty members of the Department of history . . . endeavor to help students become educated and conscientious citizen scholars” and “contribut[e] to historical discourse through presentations and publications.” (Union Ex. 47).

A variety of letters and materials sent to prospective liberal-arts students make no mention of religion at all, instead touting the career success of graduates and the number of majors offered. (Union Ex. 51; Union Ex. 56; Union Ex. 59; Union Ex. 65; Employer Ex. 64). Some also mention the “quality of teaching and engagement” of Duquesne’s faculty, (Union Ex. 57), “a group of renowned scholars who pride themselves on also being exemplary teachers, always accessible and open to students’ questions and concerns.” (Union Ex. 64 at p. 16; *see also* Employer Ex. 22 at p. 15; Employer Ex. 24 at p. 16). McAnulty College tells prospective students they will “learn[] to think on your feet, analyze problems, communicate effectively and develop innovative solutions.” (Union Ex. 63). None of these materials represent that adjunct faculty will perform any religious function or teach in a way that would be different from a secular institution.<sup>7</sup>

Although Duquesne’s materials make some mention of spiritual counseling, faculty are never identified as providing those services. The Employer’s website directs students, faculty and staff to the Spiritan Campus Ministry; “[i]f you are looking for someone to walk with on

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<sup>7</sup> Indeed, the Fall 2011 Duquesne University Magazine article “The Duquesne Community: a Life of Ministry” identifies “research and teaching” as the role of faculty within the overall campus ministry. (Employer Ex. 27 at p. 29). A more recent article dealing with Duquesne’s mission does not mention any functions performed by faculty. (Employer Ex. 28 at p. 20-24).

your spiritual journey, try spiritual direction from any of our campus ministers.” (Union Ex. 31; *see also* Employer Ex. 27 at p. 30).

Duquesne’s submissions to accrediting bodies emphasize its commitments to diversity and academic freedom. (Union Ex. 10 at p. 13-17, 82; Union Ex. 13, p. 9). For example, the Psychology Department’s internal self-study, given to external evaluators in advance of their visit to the school, (Union Ex. 66, p. 4), contains an extraordinarily fine-grained account of the work of that Department. However, it conspicuously fails to represent faculty, much less adjunct faculty, as performing any religious function. (Union Ex. 66, p. 5-37). Although these submissions refer to elements of the Employer’s mission, they do not refer to any specific religious functions that faculty serve in furtherance of that mission. (Union Ex. 13; Union Ex. 10; Union Ex. 66).

### **Decision of Regional Director**

By Decision dated June 5, 2015, the Regional Director (RD) decided that the exercise of jurisdiction over Duquesne is proper under the NLRB’s new standard enunciated in *Pacific Lutheran*. The RD based this decision on the fact that the Employer utterly failed to show, under the second prong of this test, that it holds out its adjunct faculty as serving any role, much less a specific one, in creating or maintaining the Employer’s religious educational environment. (RD Dec. at p. 11).

In pertinent part, the RD explained that

**There was considerable testimony at the hearing with respect to the employment application and interview process for faculty but that testimony revealed that the described procedures are not used for adjuncts.<sup>8</sup>** Adjuncts are generally hired as the need arises due to

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<sup>8</sup>In a rare moment of candor, the Employer indeed admits this fact in its Request for Review at p. 19, when it states that “[t]he University implements hiring for mission differently for full-time faculty than it does for adjunct faculty.” And, when they say “differently,” one



registration levels and the hiring sometimes occurs at the last minute. While an application for adjunct employment exists, the Employer does not mandate it in the hiring process and it is not always utilized. Individuals sometimes submit unsolicited resumes for consideration so there is a pool of instructors available from these. Likewise, adjunct positions may be filled without advertising or posting the positions as there are past adjunct instructors available.<sup>9</sup> **The record contains only one instance of the Employer advertising for an adjunct instructor since 2012. While that advertisement self-identifies the Employer as a Catholic university, it does not contain any reference to any role the adjunct would play in furthering that identity.**

(RD Dec. at p. 5).

Moreover, as the RD found, “the Employer does not question any applicants regarding their faith, or lack thereof, and there is no requirement that faculty be Catholic, Christian or hold any religious belief.” (RD Dec. at p. 5). The RD further found, and it is undisputed, that while there are various orientations, Convocations, other campus events and access to Mission micro-grants which adjuncts are invited to avail themselves of, the adjuncts are not required to partake in any of these (RD Dec. at ps. 5-6).

Further, as the RD pointed out, the only two adjuncts who testified – the Employer notably called no adjunct to testify – do not recall “any discussion about the Employer’s Catholic identity or Mission” during their interview process, and “[n]either was told that a role in supporting the Employer’s Mission would be a condition of their employment.” (RD Dec. at p. 6). Accordingly, one of the adjuncts, Clint Benjamin, “said that the two current core classes in

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should read that they don’t hire adjuncts for mission at all; rather, they hire them for their bargain-basement price. In any case, the RD’s finding in this regard is important, for the Employer throughout this case, and including in its Request for Review, has attempted to blur the distinction between full-time faculty and adjuncts, for that is the only prayer it has of trying to prevail given the utter lack of evidence that it holds out adjuncts as performing any kind of religious function.

<sup>9</sup>The Employer concedes this point in its Request for Review at p. 20, fn. 6, quoting the Provost as testifying that “department chairs receive unsolicited curriculum vitae through the mail and solicit local Ph.D. departments when seeking to hire adjunct faculty.”

the English Department that he teaches do not have any religious, or anti-religious, content and that he does not incorporate any element of Catholicism into his teaching or his evaluation of his students.” (*Id.*). Indeed, as the RD emphasized, “[t]he English course that Benjamin teaches for the Employer is no different than the one that he teaches at a Community College.” (RD Dec. at ps. 6-7). Finally, the RD noted that Benjamin testified that he is not evaluated by either the faculty or his students in regard to his class’s “religious content, or lack thereof, or anything about the Employer’s Mission or his alleged role in it.” (*Id.* at p. 7). The RD relates that adjunct Adam Davis gave very similar testimony in the above regard (*Id.*).

The RD found -- and indeed the Employer has conceded throughout this case, including in its Request for Review at p. 11 & fn. 4 and p. 39 -- that “adjuncts are not required to be Catholic and are not told they must adhere to Catholic teachings or values in their job performance.” (RD Dec. at p. 7).

In light of these findings, the RD concluded, and quite correctly, that “the record here does not support a conclusion that the Employer holds out its adjunct professors as performing any religious function in creating or maintaining its religious educational environment.” (RD Dec. at p. 10). As the RD explains:

While there is voluminous evidence in the record concerning the Employer’s religious identity and its stated Mission, there is scant evidence that adjuncts are expected to act in any way to advance the Employer’s religious message or to do anything with regard to it, other than not be openly hostile to it.

And, cutting through the Employer’s continued and disingenuous attempts to simply lump the adjunct faculty with all other “faculty” in an obvious attempt to overcome its weak case, the RD properly concluded that “[a]lthough there may be evidence that ‘faculty’ in the broad sense may be charged with certain responsibilities, there is no evidence that adjuncts have any such

responsibilities.” (RD Dec. at p. 10). Rather, as the RD concluded, “the record supports a finding that the petitioned-for adjunct professors do not have the same standing and are not treated by the Employer in the same manner as the full-time faculty are treated, whether they are tenured or non-tenured.” (*Id.*). Indeed, it is important to emphasize that the Employer, though bearing the burden of showing that it should receive the exemption it seeks from NLRA coverage, did not even attempt to put on testimony either by adjuncts or by administrators in charge of actually hiring adjuncts. And, presumably it did not do so because their testimony could not save the Employer from these conclusions of the RD.

Further, the RD concluded that

In its website and publications, the Employer makes no claim that the adjunct instructors who are members of the petitioned-for unit play any role in contributing to the University’s mission or religious environment. The [one and only] Employer’s advertisement for an adjunct instructor which is included in the record does not reference any duties that the applicant will support and/or be knowledgeable about the Employer’s religious aspirations. There is no mention of any such duties in the adjuncts’ employment contracts and there is no evidence that adjuncts are personally informed that they have these types of responsibilities. Neither are the adjuncts evaluated on these types of responsibilities. Neither are the adjuncts evaluated on performance of any religious functions nor is there any evidence of adjuncts having been disciplined for failure to perform any such functions. Therefore, a reasonable candidate for an adjunct teaching position with the Employer would not conclude that any religious responsibilities were required by their job duties.

(RD Dec. at ps. 10-11).

Finally, the RD considered, but rejected, the Employer’s claims that the general information about “faculty” it provided at the hearing was somehow enough to satisfy its burden of showing that it holds its *adjunct* faculty out as having a role in advancing the religious mission of the school. As the RD astutely pointed out, “[t]here is no evidence that such religious duties are conveyed to adjuncts, or are a consideration in hiring, job performance, the course content of

adjuncts, or the continued contractual renewal of any adjunct. In the absence of specific substantial evidence, generalized statements concerning ‘faculty’ in the Employer’s publications or on its website are the type that the Board found insufficient in *Pacific Lutheran University* and are unpersuasive here.” (RD Dec. at p. 11).

### **Argument**

#### **The Employer Has Waived Any Claim to Religious Exemption**

It is undisputed in this case that the Employer knowingly negotiated and entered into a Stipulation to Election in which it waived the right to a hearing; agreed that the record in the case, including the Stipulation, be governed by the Board’s Rules and Regulations; and stipulated that it is an Employer within the meaning of the Act. (Board Ex. 1(f)). Employer’s President, Charles Dougherty, admitted that he approved of this Stipulation and that he understood by doing so that the Employer was not objecting to the NLRB’s assertion of jurisdiction. (Tr. 160-161, 166) (*see also* Union Ex. 1 (rejected) (Duquesne counsel expressly stating that “[t]he employer has no objection to the NLRB’s jurisdiction in this matter.”)).

In light of these facts, the Union has taken the position throughout these proceedings, and continues to take the position, that the Employer has waived its right to claim a religious exemption in this case. (Tr. 10, 161-164). And, while the RD decided in a footnote that the Employer is not bound by its stipulation, but instead may raise its jurisdictional objection at any time (RD Dec. at p. 2, fn. 5), we respectfully submit that the RD was in error on this score.

In *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court declined to construe the Act as granting the Board jurisdiction over religious schools. It reasoned that allowing such jurisdiction would raise serious Constitutional issues and interpreted congressional silence on the matter as an intention not to give the Board jurisdiction. *Id.* at 504, 507. The

Employer argues that this means that the question of whether the Employer meets the criteria laid out in *Pacific Lutheran University*, 361 NLRB No. 157 (2014), for a religious exemption is jurisdictional and thus not subject to waiver.

However, the Employer's position stands in direct opposition to recent Supreme Court teaching on the subject of differentiating jurisdictional and non-jurisdictional issues. In *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the Court provided a "readily administrable bright line rule." *Id.* at 516. "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed . . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the limitation as non-jurisdictional in character." *Id.* at 515-516 (holding that defendant had waived non-jurisdictional threshold requirement for Title VII claim). As the Court noted in *Catholic Bishop*, Congress did not explicitly provide for any limits on the Board's power over religious employers, jurisdictional or not. Therefore, under *Arbaugh*, the limitation on the Board's authority read into the statute in *Catholic Bishop* must be classified as non-jurisdictional. See *Smith v. Angel Food Ministries, Inc.*, 611 F.Supp.2d 1346, 1349 & n. 4 (M.D. Ga. 2009) (relying on *Arbaugh* to hold that religious exemption under Title VII is non-jurisdictional). Accordingly, the Employer has waived its religious objection.

For these reasons, NLRB, Region 6 should find that the Employer has waived any claim to religious exemption, and certify the election results accordingly. However, even if the Region were to reject this waiver argument, as the Union demonstrates below, the Employer has not, and cannot, meet its burden of showing that it is entitled to a religious exemption to NLRB jurisdiction.

## **The Employer's Religious Exemption Claim Fails on The Merits**

Just last year, the NLRB set forth a new test to determine whether the Board should exercise jurisdiction over a school claiming a religious exemption. In short, the NLRB announced a two-prong test, which it summarized as follows:

when a college or university argues that the Board cannot exercise jurisdiction over a petitioned-for unit of faculty members because the university is a religious one, the university must first demonstrate, as a threshold requirement, that First Amendment concerns are implicated by showing that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the university must then show that it holds out the petitioned-for faculty members themselves as performing a specific role in creating or maintaining the college or university's religious educational environment, as demonstrated by its representations to current or potential students and faculty members, and the community at large.

*Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 11 (Dec. 16, 2014). This framework places the burden of proof upon the Employer asserting the exemption. Because we believe that Duquesne has satisfied the first prong of the test in that it holds itself out as providing a religious educational environment, the Union will focus on the second prong of the *Pacific Lutheran* test.

In describing the inquiry under the second prong of its test, the NLRB explains:

if teachers play a "critical and unique role" in creating and sustaining a religious environment, the Board's assertion of jurisdiction over them could result in interference in management prerogatives and "open the door to conflicts between clergy-administrators and the Board." . . . By contrast, where faculty members are not expected to play such a role in effectuating the university's religious mission and are not under religious control or discipline, the same sensitive *First Amendment* concerns of excessive entanglement raised by the Court are not implicated. In these circumstances, it is appropriate for the Board to assert jurisdiction for the same reasons that it is appropriate to assert jurisdiction over employees at other types of religious organizations, that is, because assertion of the Board's jurisdiction does not raise concerns under either the *Free Exercise Clause* or the *Establishment Clause of the First Amendment*. See, e.g., *Catholic Social Services*, 355 NLRB 929, 929-930 (2010) (asserting

jurisdiction over facility providing childcare services where an "ancillary" part of social services provided included "wholly secular education" to a small number of children); *Salvation Army*, 345 NLRB 550, 552 (2005) (asserting jurisdiction over resident advisors at facility providing prerelease services to prisoners and probationers).

*Pacific Lutheran*, slip op. at 7-8 (citing *NLRB v. Catholic Bishop of Chicago*, 449 U.S. 490 (1979)). The NLRB further explains, “[f]aculty members who are not expected to perform a specific role in creating or maintaining the school's religious educational environment are indistinguishable from faculty at colleges and universities which do not identify themselves as religious institutions and which are indisputably subject to the Board's jurisdiction. Both faculty provide nonreligious instruction and are hired, fired, and assessed under criteria that do not implicate religious considerations.” *Id.* at p. 8.

The NLRB further clarified that

The focus is on whether faculty members are held out as having such an obligation as part of their faculty responsibilities. Although we will not examine faculty members' actual performance of their duties, we shall require that they be held out as performing a *specific religious function*. Generalized statements that faculty members are expected to, for example, support the goals or mission of the university are not alone sufficient. These types of representations do not communicate the message that the religious nature of the university affects faculty members' job duties or requirements. They give no indication that faculty members are expected to incorporate religion into their teaching or research, that faculty members will have any religious requirements imposed on them, or that the religious nature of the university will have any impact at all on their employment. **This is especially true when the university also asserts a commitment to diversity and academic freedom, further putting forth the message that religion has no bearing on faculty members' job duties or responsibilities.** Without a showing that faculty members are held out as performing a specific religious function, there is no basis on which to distinguish these employees from faculty members at nonreligious universities or to exclude them from coverage under the Act.

*Pacific Lutheran*, slip op. at 8-9 (emphasis added).

Finally, the NLRB relates, in a passage very relevant to this case:

If the evidence shows that faculty members are required to serve a religious function, such as integrating the institution's religious teachings into coursework, serving as religious advisors to students, propagating religious tenets, or engaging in religious indoctrination or religious training, we will decline jurisdiction. Likewise, if the college or university holds itself out as requiring its faculty to conform to its religious doctrine or to particular religious tenets or beliefs in a manner that is specifically linked to their duties as a faculty member, we will decline jurisdiction. However, general or aspirational statements, without specificity as to how the requirement affects actual job functions, will not suffice.

*Pacific Lutheran*, slip op. at 9.

In the instant case, Duquesne has entirely failed to meet its burden. The way the Employer holds out its adjunct faculty to the public, to students, to the faculty themselves, and in the testimony of its witnesses at hearing makes it clear that this is the type of case in which the Board will assert jurisdiction under *Pacific Lutheran*. This is so because all of these representations make it clear that the adjunct faculty members involved here have no religious function, specific or otherwise, in their teaching or in their interactions with students.

As an initial matter, Duquesne held itself out as not requiring adjunct faculty to fulfill any religious role by telling the Union, the adjunct faculty involved in the organizing campaign, and the public that it would consent to the Board's jurisdiction and that the Board processes were the appropriate channels through which an election should be conducted. (Tr. 160-161; 479-481). Through this representation, Duquesne implied that the adjunct faculty it employs are not meaningfully different from adjunct faculty employed by secular institutions. Duquesne's own statements regarding the propriety of Board jurisdiction constitute evidence as to how it held itself out, even if the Board were to determine those statements did not waive its ability subsequently to raise a religious objection.

Second, as demonstrated above, and as was found to be significant in *Pacific Lutheran*, Duquesne publicly asserts that it values diversity, including religious diversity, amongst its



students and faculty alike. (*See, e.g.,* Union Ex. 7; Employer Ex. 39). For example, in an FAQ almost identical to the one analyzed in *Pacific Lutheran*, Duquesne makes it clear to prospective students that they need not be Catholic and that, indeed, Duquesne’s ecumenical mission means that the school is “welcoming to students from all faiths . . . .” *See, Pacific Lutheran*, slip op. at p. 12 (such an FAQ militates in favor of the Board asserting jurisdiction); (Union Ex. 19).

President Charles Dougherty further made it clear that Duquesne is open to students and faculty of “even no faith at all,” and that such students and faculty won’t be required to do anything incompatible with such lack of faith (Tr. 88). Indeed, while students at Duquesne are required to take two courses in theology, such courses can be comparative religion classes, and, in no case need even one be Catholic theology (Union Ex. 27 at p. 50; Union Ex. 14 at ps. 2-3). *See, Seattle University*, 19-RC-122863, slip op. at 6 (RD Decision, March 3, 2015) (relying upon *Pacific Lutheran* in concluding that Jesuit University was not entitled to religious exemption even where students were required to take a course including a component of Catholic tradition). Moreover, its Mission Statement proclaims its commitment to ecumenicism.

For his part, the Provost made it clear that those hiring faculty at Duquesne are not even permitted to ask them about their religious affiliation upon hire (Tr. 300-301). *See, Seattle University*, slip op. at 4 (that University’s policies forbid it from asking interviewees about religion or creed was factor weighing in favor of asserting jurisdiction under second prong of *Pacific Lutheran*).

In addition, Duquesne makes it abundantly clear, in both its public documents and witness testimony, that all of the faculty have academic freedom, with the possible sole caveat that they should respect the Mission of the University -- which is, in any case, “ecumenical,” meaning that it celebrates diversity. (Tr. 353-354). Quite apropos here is the Board’s statement

in *Pacific Lutheran* that “we are again not convinced that requiring faculty members to support widely shared university values, such as a commitment to diversity and academic freedom, provides prospective applicants with any indication that they would be expected to perform any specific religious function that would differ from their functions at virtually any university, or that evaluation of their success in fulfilling these goals would be any different.” *Pacific Lutheran*, slip op. at ps. 9-10, fn. 16; *see also*, *Seattle University*, slip op. at 9 (faculty handbook’s proviso that “[e]ach member of the faculty is expected to show respect for the religious dimension of human life’ . . . is the sort of generalized statement that the Board in *Pacific Lutheran University* found insufficient” to trigger religious exemption).

And, both the adjunct witnesses in this case, just as the adjuncts in *Pacific Lutheran*, testified that they have never been apprised of any duty to support the Mission of the University, much less that they would have any religious function to play or be evaluated on their ability to fulfill such a function.<sup>10</sup> *See*, *Pacific Lutheran*, slip op. at p. 12 & fn. 23; 13-14 (Board finding such un rebutted testimony to be significant in determining that the university could not meet its burden of showing that its faculty are held out as playing a significant religious role). Indeed, the following finding of the Board in *Pacific Lutheran*, slip op. at ps. 13-14, is equally applicable to the testimony of the adjuncts in this case: “contingent faculty members testified . . . without any rebuttal by PLU, that there was no discussion about religion, in any context, during their interviews, no requirement that course material requires a religious component and no

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<sup>10</sup> Just as in *Seattle University*, slip op. at p. 4, while Duquesne’s witnesses, such as the Provost, testified that some of the administrators, tenure-track faculty, and chairs are asked upon hire about how they intend to carry out the Mission of the University, none of these witnesses have any responsibility for interviewing adjuncts, or any other means of knowing how adjuncts are hired, and therefore could not offer rebuttal to the adjuncts’ testimony that they themselves are asked no such questions.

requirement that they perform any function in support of a religious education environment.” Further, as was found significant in *Seattle University*, slip op. at 5, the adjuncts here also testified that “adherence to Catholic or any religious doctrine plays no role in faculty evaluations.”

Moreover, the contract the adjuncts sign to teach at Duquesne is devoid of any representations in regard to religion or religious duties, and doesn’t even include the University’s boilerplate Mission Statement. (Union Ex. 22). This makes the instant case even more favorable to the Union’s position than the one presented in *Pacific Lutheran*, slip op. at p. 13, where the adjunct contracts at least contained Pacific Lutheran’s Mission Statement. And, as the Board found significant in *Pacific Lutheran*, slip op. at fn. 26, the adjunct faculty at Duquesne have guarantees -- both through the Statement of Academic Freedom adopted by Duquesne and the Middle States Requirements -- that they are not expected to carry out any religious function not set forth in writing at the time of appointment. See, *Statement of Facts*, *supra*. at ps. 4-21. This makes the instant case even stronger for the Union than that recently decided by another RD in the case of *Saint Xavier University*, Case 13-RC-022025 (June 1, 2015). Thus, the RD concluded in that case that even statements in adjunct job advertisements that “Understanding of and appreciation for the Catholic identity and Mercy heritage of the University required,” were merely “the sort of generalized statements that the Board in *Pacific Lutheran* found insufficient” to trigger a religious exemption. *Id.* slip op. at 11.<sup>11</sup> Given that no such statements appear in the sole advertisement for an adjunct at Duquesne, ours is an even stronger case.

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<sup>11</sup>Of note, the RD in *Saint Xavier University*, slip op. at page 11, concluded that representations about the duties of faculty contained in the Application for the *Ex Corde Ecclesiae* -- a document the Employer in this case tries to make much of -- were also the generalized statements found not to entitle a university to a religious exemption.

Furthermore, the University does not identify adjunct faculty as performing any religious function in its communications to any other audience. Rather, Duquesne emphasizes faculty members' status as renowned researchers and engaged teachers. (Union Ex. 35; Union Ex. 36; Union Ex. 37; Union Ex. 38; Union Ex. 43; Union Ex. 47; Union Ex. 52 at p. 3).

Indeed, Duquesne's own public statement about this very proceeding contain no assertions that adjunct faculty perform any religious function or that they must conform to any particular religious beliefs. President Dougherty, in a media statement released June 22, 2012, speculated that bargaining with the USW might impair the University's ability to consider adjunct faculty's commitment to its mission when hiring or firing.<sup>12</sup> (Employer Ex. 20). The statement asserts nothing about specific duties or functions of adjunct faculty; it is also demonstrably false in its implication that Duquesne asks adjunct faculty anything about their commitment to its mission in the hiring process.

In the end, then, as the Board in *Pacific Lutheran* explained about the faculty at issue therein, the adjuncts at Duquesne fulfill a role indistinguishable from their role at other, secular

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<sup>12</sup> It is worth noting that President Dougherty's fears are hysterically overblown. Section 8(d) of the Act specifically provides that the duty to bargain does not require an employer to agree to anything. Moreover, the Duquesne staff represented by Board-certified unions answer more questions about their commitment to the Employer's mission in the hiring process than do adjunct faculty. (See Employer Ex. 36). This confirms that there is no incompatibility between collective bargaining and such questions. To the extent that the Employer argues that its obligation to bargain over health insurance coverage with the Union would impinge on its religious freedom, (Tr. 155-156), this concern is fallacious for the same reasons. The Employer would have no obligation to agree to anything to which it holds a moral objection because no employer is obliged to agree to anything at all. Furthermore, the Employer has evidently bargained over health insurance with its other Board-certified unions with no harm to its religious positions on health care. (Tr. 112, 154, 197; Employer Ex. 33 ("Collective bargaining unit employees should defer to their agreement for benefit details."))

Universities.<sup>13</sup> Indeed, adjunct Clint Benjamin explained as much. (Tr. 457). This is quite consistent with Duquesne's own witnesses, who made it clear that, as long as faculty perform their teaching, even of purely secular subjects, well, and don't go out of their way to denigrate the University's ecumenical Mission, they are advancing Duquesne's goals. (Tr. 96, 421, 430). This is so because the Mission of the Duquesne -- which values educating and serving students, the promotion of diversity, the respect of others from diverse backgrounds, and interfaith dialogue -- is not unlike the mission of most universities. *See, Pacific Lutheran*, slip op. at 13 & fn. 25 (Board finding that analogous Mission of Pacific Lutheran, a statement of which was enunciated throughout that school's literature, "describes values [of education, service, leadership and care for others and the earth] that are emphasized by nonreligious institutions as well.").

Applicable here is the conclusion of the Board in *Pacific Lutheran*:

In short, there is nothing in PLU's governing documents, faculty handbook, website pages, or other material, that would suggest to faculty (either existing or prospective), students, or the community, that its contingent faculty members perform any religious function. Accordingly, although we find that PLU holds itself out as providing a religious

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<sup>13</sup> The only adjunct faculty who might arguably be held out as performing a religious function are the few adjuncts in the theology department who are required to hold mandata from a Catholic bishop certifying that they teach correct Catholic theology. *See* n.6, *supra*. And, the record only shows one of those currently teaching at Duquesne, and, what's more, she teaches Global and Cultural Perspectives -- not Catholicism or even Christianity. *Id.* For its part, even Duquesne claims that there is only one adjunct involved in this case which receives a mandatum (Request for Review at p. 37). Moreover, the record is clear that no student or faculty member is required to adhere to or instill Catholic doctrine. Therefore, even the one adjunct that the record shows is still at Duquesne is entitled to union representation protected by the NLRA. *See, Seattle University*, slip op. at p. 6 (theology faculty, including those required to have expertise in Catholicism, still appropriately covered by Act in light of fact that "there is general evidence that no student or faculty member is required to adhere to or instill Catholic or Jesuit doctrine."); *Saint Xavier University*, slip op. at 13 (Religious Studies adjuncts, including those with a mandatum from the Bishop of Chicago, are still properly in the unit given that the mandatum "is specific to the particularized coursework being taught and, on its face, is no different than a mathematics instructor being required to teach calculus accurately.").

educational environment, we find that we may assert jurisdiction because PLU does not hold its petitioned-for faculty members out as performing any religious function.

*Pacific Lutheran*, slip op. at p. 14.

### **Conclusion**

While the Employer purports to offer a religious educational environment, neither students, the public, nor the part-time faculty in the petitioned-for unit are told that those faculty have any specific functions different from instructors at any other educational institution. The Employer has utterly failed to shoulder its burden of establishing that it holds the part-time faculty out as carrying out any specific religious duties to advance the religious mission of the university. Although Duquesne spills a lot of ink about its mission, that is precisely the sort of generalized statement that the Board held was not sufficient in *Pacific Lutheran University*. For these reasons and because the Employer has waived its right to contest the issue by consenting to the Board's jurisdiction, the Region should certify the results of the election.

Dated: June 26, 2015

Respectfully submitted,

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**Certificate of Service**

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